SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 352

CONSOLIDATED FREIGHTWAYS, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled cause, affirming the judgment of the United States District Court for the District of North Dakota.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 121 to 129) is not yet reported. The only opinion of the District

Court is that which was rendered on the overruling of petitioner's motion to quash the information (R. 16). This opinion is not reported. The order of the District Court overruling petitioner's plea in bar is at R. 26; its order overruling petitioner's demurrer is at R. 27; its judgment and sentence is at R. 95.

Jurisdiction.

The opinion and decision of the Circuit Court of Appeals was rendered July 6, 1943 (R. 129). A petition for rehearing was denied August 13, 1943 (R. 149). This petition is filed within the period prescribed in Rule XI of the Criminal Appeals Rules. The jurisdiction of this Court is invoked under Section 240 (a) (28 U. S. C. A. Sec. 347 (a)) of the Judicial Code as amended by the Act of February 13, 1925.

Statutes Involved.

Sections 206 (a), 208 (a), 208 (b), and 222 (a) of the Interstate Commerce Act (49 U. S. C. A. 306 (a), 308 (a), 308 (b) and 322 (a)) provide:

> Section 306 (a): Necessity for; motor carriers in bona fide operation on June 1, 1935. Except as otherwise provided in this section and in section 310a, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 310, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June, 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing

seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this chapter and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. * * *.

Section 308 (a). Specification of routes and termini; extension of routes; restriction on additions to equipment. Any certificate issued under section 306 or 307 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements estab-

lished by the Commission under section 304 (a) (1) and (6); *Provided, however,* that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Section 308 (b). Deviation from route. A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

Section 322 (a). Any person knowingly and wilfully violating any provision of this chapter, or any rule, regulation, requirements, or order thereunder, or any term or condition of any certificate * * * for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 * * *. Each day of such violation shall constitute a separate offense.

Questions Presented.

1. Applicability of rule of *res adjudicata:* Where an information is filed against a motor carrier which charges as a crime under the Interstate Commerce Act the transportation of certain shipments over a certain highway under certain conditions and circumstances and the defendant motor carrier interposes a general demurrer on the ground that the information does not state any offense against the laws of the United States, which demurrer is sustained by the District Court, is that decision *res adjudicata* in a subsequent prosecution of the same defendant under an information charging identical acts (the only difference being in the date of the shipments) under identical provisions of the statute (Stipulation R. 8, 9)?

2. Construction of Interstate Commerce Act as a criminal statute: Does the Interstate Commerce Act, in addition to specifically giving the Interstate Commerce Commission powers to issue cease and desist orders and also the right to resort to Federal Courts to enjoin any operations or practices deemed by it to be unauthorized, make it a crime for a motor carrier to deviate from the highway named in its certificate or used by it prior to June, 1935, in rendering a service between points which it is authorized to serve, or, in other words, is the harmless use of an alternate route to render a fully authorized service, which use results in no new or different service to the public, a criminal offense?

Statement of the Case.

The so-called "grandfather clause" of Section 206 (a) of the Interstate Commerce Act (page 2 *supra*) confirms to motor carriers the right to continue to operate, without proof of public convenience and necessity, "over the route or routes or within the territory for which application is made" if they so operated prior to June, 1935, and continuously thereafter. Petitioner, a motor carrier subject to the Interstate Commerce Act, has unquestioned grandfather rights to transport general freight from Minneapolis and St. Paul, Minnesota, to Miles City, Montana, and points west in Montana, Idaho, Oregon, and Washington (Stipulation R. 8-9). Prior to the grandfather date (June 1, 1935) petitioner had used only U. S. Highway No. 10 across North Dakota through Miles City, Montana, to points west (Exhibit 1 R. 11 at R. 15).

After the grandfather date (Exhibit 1 R. 11 at R. 15) petitioner adopted the practice of shipping some of its traffic by rail from itself at Minneapolis to itself at Marmarth, North Dakota, and then transporting such traffic in its own trucks from Marmarth, over U. S. Highway No. 12,

to that highway's junction with U. S. Highway No. 10 near Miles City, and thence on west over U. S. No. 10 to various destination points. Petitioner did not have a certificate of public convenience and necessity naming that portion of U. S. Highway No. 12 between Miles City and Marmarth, nor did it claim to have used it prior to the grandfather date.

In 1938 an information was filed against petitioner in the United States District Court for North Dakota charging in 48 counts the transportation of such shipments from Marmarth to Miles City "without there being in force a certificate of public convenience and necessity * * * authorizing said operations" (Case No. 6664, R. 27-8-9). To this information petitioner interposed a general demurrer (R. 22) "for the reason that said counts wholly failed to state any offense against the laws of the United States of America".

After an oral argument upon that demurrer and motion, of which no record was made, briefs were presented by the parties. Those briefs were devoted exclusively to arguing the general demurrer (R. 30-88). Thus in petitioner's opening brief it was said (R. 34):

> "The whole question then is whether the Motor Carrier Act of 1935 clearly and explicitly makes it a crime for the defendant to operate its vehicles over any highways, except those that the Commission would at a later date determine the defendant had a right to use by reason of its operations conducted prior to June 1, 1935.
>
> "It is the defendant's contention that the operations of its vehicles upon Highway No. 12 was not a violation of the Motor Carrier Act; that the terms of the Act cannot be construed to confine common motor carriers of property to certain roads in addition to confining them to the service of certain cities, towns and communities; and that this information therefore fails to charge a crime."

And the Government's brief (R. 59) as clearly stated the issue (R. 67):

> "The defendant * * * takes the flat position that if it was authorized to transport property from Minneapolis, Minnesota, to Miles City, Montana, by U. S. Highway No. 10, it was, by force of that authorization, likewise authorized to transport property from Minneapolis, Minnesota, to Miles City, Montana, by any highway it saw fit to use or by any railroad. To state this argument tersely it is contended that the words 'route' or 'routes' as used in the Motor Carrier Act, 1935, do not mean 'highway' or 'highways', and if we understand it correctly, this is the crux of defendant's argument which we will meet."

At the time petitioner filed the aforesaid general demurrer it also filed a separate motion to quash based upon entirely separate theories (R. 23) and supported by an affidavit (R. 24). One of the grounds of that motion was that petitioner's grandfather case was pending undecided before the Interstate Commerce Commission and that "there can be no prosecution of defendant until there has been a determination by the Interstate Commerce Commission of the defendant's right to operate as a common carrier between the points set out in the various counts of the information" (R. 23). The supporting affidavit did not state that petitioner claimed grandfather rights between Marmarth and Miles City, but referred to the grandfather application then pending which claimed rights "between Minneapolis, Minnesota, and Seattle, Washington, and between various points and places in the States of Washington, Oregon, Idaho, Montana, North Dakota and Minnesota and points and places in the other aforesaid states" (R. 24).

Before argument upon the demurrer and motion in the former criminal case the Interstate Commerce Commission handed down its decision upon the said grandfather appli-

cation of petitioner and the Commission therein found petitioner's operations between Marmarth and Miles City unlawful because commenced after the grandfather date without proof of public convenience and necessity (R. 15). The Commission decision also expressly rejected petitioner's contentions that the law does not forbid the use of an alternate means of rendering an authorized service, that public convenience and necessity is not affected in such instances where no service is given by the carrier to the public located along such alternate highway. The prosecution quoted this Commission decision in its answering brief under the rule for construction of *ambiguous* statutes to the general effect that the construction placed upon the statute by the administrative body charged with its enforcement is entitled to great weight (R. 74-76). The District Court sustained *both* the demurrer *and* the motion to quash (R. 88). The Government took no appeal and that decision became final.

Thereafter, in 1941, petitioner made further shipments, identical with those which had been challenged in the prior prosecution, and again the Government filed an information charging violation of the Interstate Commerce Act. That information is the one involved in this case. Petitioner filed a demurrer identical with the one filed in the prior prosecution (R. 27). It also filed a motion to quash (R. 3) and a plea in bar (R. 20) on the ground that the ruling in the prior prosecution was *res adjudicata* and was a bar to the prosecution of this proceeding. The Government stipulated that the two prosecutions were identical except for the dates of shipment (R. 8-9). It contended, however, that the rule of *res adjudicata* did not apply because, in the meantime, the Interstate Commerce Commission had held (in the proceedings pending at the time of the prior prosecution) that petitioner did not have the right under the "grand father" clause to operate between Marmarth and Miles

City (R. 11-15) and had denied petitioner a certificate of public convenience and necessity to operate over this highway (R. 92-95).

The District Court sustained the Government's contention (R. 16-17, 26) and, upon stipulated facts (R. 89-91) and a trial to the court (a jury having been waived, R. 26), found petitioner guilty (R. 94) and imposed a fine of $15 on each of the 117 counts of the information (R. 95-96).

The Circuit Court of Appeals affirmed the Judgment of the District Court (R. 129).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the ruling of the District Court in the prior proceedings (Case No. 6664), that the information stated no offense under the Interstate Commerce Act, is not res adjudicata of the identical issue between the same parties in this proceeding.

2. In failing to find that petitioner was not guilty, for the reason that the Interstate Commerce Act does not prohibit petitioner's use of an alternate highway to render a service which petitioner has unquestioned rights under the Act to perform.

Reasons for Granting the Writ.

I.

The court below has rendered a decision on the issue of res adjudicata which is contrary to applicable decisions of this Court and in conflict with decisions of other Circuit Courts of Appeals and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The acts charged as unlawful in the instant case are stipulated to be similar in every material respect to those

charged by the information in the former case (No. 6664) (R. 8-9). There has been no material change in the statute. The demurrer in the former case raised a question of pure law. Is it a crime under the Act for a motor carrier to deviate from the highway which it used before the grandfather date or which is named in its certificate of public convenience and necessity, if such use does not result in any new or different service to the public?

In this case your petitioner raised the defense of res adjudicata and urged upon the court below the well-settled rule that, as between the same parties, the judgment in the former case operates as an estoppel as to those matters in issue or points controverted and upon the determination of which the verdict or finding in the former case was rendered. Your petitioner also submitted abundant authority upon the proposition that where a question of applying the estoppel of a judgment rendered upon one cause of action to matters arising in a different cause of action is presented, the inquiry must always be to the point or question actually presented, litigated and determined in the original action.

The court below apparently concedes the general rule of *res adjudicata* but seeks to escape its application by substituting its own unsupported conjecture for the only evidence as to what was actually in issue and litigated in the former case. This is evidenced from the following language in its opinion (R. 128):

> "The last contention made by the defendant is to the effect that the order sustaining the demurrer to the counts of the information constitutes an adjudication of the questions here involved. The judge hearing the matter filed no memorandum. The demurrer was addressed to the sufficiency of the information and the matters therein stated. The violations charged in the information were prior to the date of the order of the Commission determining the rights of the de-

fendant under its applications for authority. Operations by the defendant prior to February 14, 1939, over the route on which it claimed 'grandfather' rights were not in violation of the law, and that is, no doubt, what the Court ruled in sustaining the demurrer.

"We have here a new legal situation which has been created by the orders of the Commission denying the defendant authority. Operations have been carried on subsequent to the dates of such orders, and the 'precise' question in this case was not raised or determined in the criminal proceeding in which the demurrer was sustained. Under such circumstances the doctrine of res adjudicata has no application."

Your petitioner respectfully submits that the above quoted finding is in conflict with the applicable decisions of this court and the decisions of other circuit courts of appeals and so far departs from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. The Issue Presented by the Pleading and Litigated by the Parties Is the Issue Adjudicated.

The conjecture or surmise is shown by the language "and that is, no doubt, what the Court ruled in sustaining the demurrer". There was no occasion or need to suppose or surmise what the former court had in mind. The language of the demurrer itself and the briefs of the parties constitute the only evidence of record as to what was in issue and actually litigated in that former case. The demurrer said merely that the acts charged by the information did not not constitute crimes under the statute. The petitioner's opening brief, the prosecution's answering brief and petitioner's reply brief were entirely devoted to that one strictly legal question, i. e.: Is it a crime under the Act for a motor carrier to deviate from the roadbed which it used before the grandfather date or which is named in its certificate of public convenience and necessity

if such use does not result in any new or different service to the public? That was the one and only issue presented by the demurrer and the one and only issue argued before the District Court in the former case.

Yet the court below finds that the decision sustaining the demurrer in that former case did not adjudicate that one and only issue. It says merely that the former court must have had something else in mind. In thus deciding by conjecture rather than by an examination of the issues presented by the demurrer and litigated by the parties the lower court rendered a decision in conflict with:

Bingham v. *United States*, 296 U. S. 211, 217-8-9; 80 L. Ed. 160, 163-4; 56 S. Ct. 180, 185;
West v. *Standard Oil Co.*, 278 U. S. 200, 214-5; 73 L. Ed. 265, 272; 49 S. Ct. 138, 142,

and with the following decisions of other circuit courts of appeals:

E. I. DuPont DeNemours & Co. v. *Sylvania Industrial Corporation*, C. C. A. 4th Cir., 122 F. (2d) 400, 404;
Kelliher v. *Stone & Webster*, C. C. A. 5th Cir., 75 F. (2d) 331, 332-3.

In *Bingham* v. *United States*, 296 U. S. 211, 217-8-9, 80 L. Ed. 160, 163-4, 56 S. Ct. 180, 185, the question of the addition of certain sums received by beneficiaries of insurance policies to decedent's other property in determining tax was involved. The District Court (7 F. Supp. 907) held for the taxpayer upon the authority of *Lewellyn* v. *Frick*, 268 U. S. 238. This decision was reversed by the Circuit Court of Appeals (*United States* v. *Bingham*, 76 F. (2d) 573, 574), which held that the *Frick* case was not determinative, as no reference had been made by the Court in its opinion to those provisions in the insurance policies which were vital to claim of the taxpayer.

The Supreme Court reversed the Circuit Court of Ap-

peals. Mr. Justice Sutherland, in delivering the unanimous decision of the Court, stated:

> "We think the view taken by the district court is the correct one. * * * The court below sought to distinguish the decision on the ground that this court did not refer to those specific provisions set forth in the policies and assignments which are pertinent here. The government makes the same point, and contends that since this court did not allude to those provisions in the opinion, the decision cannot be regarded as having passed on their effect. It is true that questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. *Webster* v. *Fall*, 266 U. S. 507, 511. That, however, is not the situation in the present case. In *Lewellyn* v. *Frick*, the policies and assignments, in their entirety, were definitely before the court; and this necessarily included each of the provisions which they contained. Moreover, both in the appendix to the government's brief, and in the main brief of the taxpayers, the attention of the court was distinctly called to all the provisions which are now invoked. The latter brief summarized and described the provisions of the four classes of policies which were involved—one class being policies, it was pointed out, made payable to the Frick estate 'subsequently assigned by Mr. Frick to his wife or daughter if she survived him, without reserving power to revoke the assignments'. This court, without stopping to recite the various specific provisions that were thus clearly brought to its attention, held that the proceeds of none of the policies were subject to the estate tax under section 402(f). It fairly must be concluded that in reaching that result these provisions were considered, and that such of them as bore upon the problem, there as well as here presented, were found not to require a different determination. We think the points now urged by the government were decided in the Frick case, and find no reason to reconsider them."

Syllabus 4 of the official reports (296 U. S. 211, 212), which is a terse summary of the above quoted portion of the opinion, shows how far the lower court has departed from this decision of the Supreme Court. This syllabus reads as follows:—

> "4. Matters pertinent to an issue before the court which were clearly presented to it, are to be taken as covered by the decision though not mentioned in the opinion. P. 218."

In the case at bar, the court below surmises that the decision in the former case settled an issue not raised by the demurrer and not argued before the court, an issue which, in fact, could not have been raised by a demurrer.

In *West* v. *Standard Oil Co.*, 278 U. S. 200, 214-5, 73 L. Ed. 265, 272, 49 S. Ct. 138, 142, Standard Oil had sought to enjoin the continuation of proceedings, by the Secretary of Interior, to determine the mineral character of certain lands. Secretary Fall had many years before dismissed a hearing called for the purpose of determining the mineral character of this same land. If this order of the Secretary was made on a finding that the land was not mineral, the Department of the Interior had lost jurisdiction of the land and the injunction should issue. The order of dismissal had been brief and did not recite the reasons. To determine the effect of this order, the Supreme Court examined all the proceedings before Secretary Fall and found therefrom:

> "And when the occurrences which preceded the making of the order are examined, it becomes clear that Secretary Fall made no determination of the contested issue of fact, which was to be the subject of a hearing before local officers if he deemed the issue material. He rested his order of dismissal on a supposed rule of law; holding, on the admitted facts, that the actual known mineral character on January 26, 1903, was not of legal significance. In so ruling, he yielded to the

argument of counsel for the Standard Oil Company, who insisted that the then known mineral character had become immaterial, because the government was estopped, by action taken prior to 1921, from questioning the Company's title. The brief filed by counsel with Secretary Fall prior to his granting the hearing; the notice of the proposed hearing before Secretary Fall on June 6, 1921, given by the Department to the Attorney General and the Secretary of the Navy; and the stenographic report of the hearing, establish that this was the only matter considered by Secretary Fall."

From this finding the Court concluded:

"When Secretary Fall undertook to determine, not as a fact whether the land was known to be mineral in 1903, but as a proposition of law that, because of other conceded facts, the Company's title had become unassailable, he acted without authority; and the order of dismissal based thereon did not remove the land from the jurisdiction of the Department."

In *E. I. DuPont DeNemours & Co.* v. *Sylvania Industrial Corporation,* (C. C. A. 4th Cir.) August 16, 1941, 122 F. (2d) 400, 404, action was brought by DuPont against Sylvania for infringement of trade-mark and unfair competition, which involved the validity of the word "cellophane" as a trademark. Defendant Sylvania averred that the character of the word "cellophane" as the descriptive name of a product was adjudicated in *DuPont Cellophane Co., Inc.* v. *Waxed Products Co., Inc.* (In that case the plaintiff in the present case, as successor to a wholly owned subsidiary, was plaintiff; and Sylvania employed counsel and defended the suit in behalf of its customer, Waxed Products Co., to the knowledge of plaintiff and the court.) DuPont contended that the opinion given in the *Cellophane-Waxed Products* case did not support Sylvania's contention. The District Judge held that plaintiff was estopped

from maintaining the present action by the final judgment adverse to DuPont in the prior case and dismissed the suit.

In affirming this decision, the Circuit Court stated, among other things:

> "The propriety of this ruling is the only question on this appeal. That question involves the determination of the basis of the court's decision in the prior case. * * *".

To make that determination, the Court proceeded to an examination of all the proceedings before the Court in the prior case, and stated:

> "Our examination of these proceedings convinced us that the court did pass upon the validity of the trade-mark, and that it was not the intention of the court to restrict the final decree to the holding that Sylvania's goods were passed off and sold as the goods of Du-Pont. It is true that the opinion suggests that something of this sort was probably involved in the defendant's practice of filling orders for cellophane with Sylvania's product. But such a practice itself may amount to trade-mark infringement, as well as unfair competition. There was in fact no proof that any one had actually been misled by the defendant's acts, and DuPont subsequently produced no such proof, although given the opportunity to do so by the accounting feature of the decree. DuPont was primarily interested in the establishment of the validity of its trade-mark. It sought, and in the first instance, obtained a favorable decree in this respect; and this ruling did not stand only because the appellate court found as a fact that the word, whatever may have been its original significance had become descriptive in character and incapable of exclusive appropriation. This finding, substantially reproduced in the final decree, was an adjudication that destroyed the validity of the trade-mark; and that the decree was so understood by Du-Pont is shown by its assignment of errors in the second appeal."

Kelliher v. *Stone & Webster*, (C. C. A. 5th Cir.) 75 F. (2d) 331, 332-3, while holding that the rule of res adjudicata was not applicable, shows by its statements as to the established principle of the rule that an examination should be made of the issues contested in the first case in order to determine the issue adjudicated and that evidence as to these issues litigated is proper. Quotation is made from that case as to the rule of res adjudicata where the second case is upon a different cause of action:

> "The prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit. * * * the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. * * * the res which may be judicata is the particular issue or fact common to both suits and to conclude that particular issue or fact, it is necessary that the records of the former suit by itself or as aided by extrinsic evidence of what occurred at the trial should show with certainty that the fact or issue was indeed litigated and decided on its merits. * * * It is the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment. * * * To this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit."

B. Lower Court's Decision Assumes Error in First Case.

The demurrer in the former case raised a question of pure law. It called only for the construction of a statute. Its decision could not properly have been affected by any factual considerations. The legal question is the same today as when it was advanced in the former case. To hold that the court in the former case sustained the general demurrer because of any factual situation presented by the

separately stated motion to quash is to find error in the former decision. That is exactly what the court below has done. Its decision, in effect, tells your petitioner that the former court must have confused the issues, that it could not have meant to sustain the proposition raised by the demurrer and argued by the parties before it, and that, therefore, your petitioner should not have relied upon that final judgment. The decision is a clear holding that because of error in the former judgment the rule of res adjudicata does not apply. This is in conflict with

United States v. *Moser*, 266 U. S. 236, 240-1-2; 45 S. Ct. 66, 67; 69 L. Ed. 262-3-4;
North Carolina R. R. v. *Story*, 268 U. S. 288, 292; 45 S. Ct. 531, 533; 69 L. Ed. 959, 962;
Reed v. *Allen*, 286 U. S. 191, 201,

and with the following decisions of other circuit courts of appeal:

Vinson v. *Graham*, C. C. A. 10th Cir., 44 F. (2d) 772, 775;
Montgomery v. *Equitable Life Assur. Soc.*, C. C. A. 7th Cir., 85 F. (2d) 758, 761.

United States v. *Moser*, 266 U. S. 236, 240-1-2, 45 S. Ct. 66, 67, 69 L. Ed. 262-3-4. Suit against the United States to recover the amount of the difference between the pay of a Captain and a Rear Admiral in the Navy. The right of the officer turned upon the question whether his service at the Naval Academy constituted service during the Civil War. The Court stated:

> "Three previous suits for installments of salary—the right of recovery in each depending upon the same basic question—were decided by the Court of Claims in his favor. In each, the contention of the Government was the same as it is here, viz: that service as a cadet

during the civil war was not service within the meaning of the statute. Between the first and second of these suits, in another suit brought by a different claimant, the court construed the statute otherwise and denied that claimant a right of recovery. *Jasper v. United States,* 43 Ct. Clms. 368; the change of opinion being made to rest upon a later act, then for the first time called to the court's attention, which, in terms, excluded the period of service as a cadet, but with a proviso that it should not apply to an officer who had received an advance of grade at or since the date of his retirement. C. 3590, 34 Stat. 553, 554.

"In the second and third *Moser Cases,* however, the Court of Claims declined to follow the *Jasper Case,* holding that, by reason of its decision in the first *Moser Case,* the question was *res judicata.* The present suit was decided in Moser's favor upon the same ground; and, in addition, the court reverted to the position taken in the first *Moser Case,* abandoning, as unsound, its view as expressed in the *Jasper Case,* upon the ground that the right of the officer was saved by the proviso.

"*We find it unnecessary to consider the latter ruling, since we are of opinion that the court was clearly right in its application of the doctrine of res judicata.*

"The general principles are well settled, and need not be discussed. The scope of their application depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits constitutes an absolute bar to the subsequent action. In the latter case the inquiry is whether the point or question presented for determination in the subsequent action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac.,* 94 U. S. 351, 352-353."

Reed v. *Allen,* 286 U. S. 191, 201. "These decisions constitute applications of the general and well settled

rule that a judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong. * * * Citations * * * The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert."

North Carolina R. R. v. *Story*, 268 U. S. 288, 292, 45 S. Ct. 531, 533, 69 L. Ed. 959, 962. Mr. Chief Justice Taft. "Coming now to the merits, it may be conceded that the first judgment against the Company in favor of the Administrator, however erroneous it was in view of the cases of Missouri Pacific Railroad v. Ault, 256 U. S. 554, and North Carolina Railroad Company v. Lee, Administrator, 260 U. S. 16, not having been appealed from was *res judicata.*"

Vinson v. *Graham*, C. C. A. 10th Cir., 44 F. (2d) 772, 775. "In applying the doctrine of estoppel by judgment, it is immaterial that the judgment which works it may have been erroneous, that the court may have been mistaken in the facts; may have misconceived the law, or may have disregarded the public policy of the nation when it rendered it, if the court had jurisdiction of the subject matter of, and the parties to, the action in which such judgment was rendered."

Montgomery v. *Equitable Life Assur. Soc.*, C. C. A. 7th Cir., 83 F. (2d) 758, 761. "If a bill states a cause of action which belongs to a general class over which the court's authority extends, jurisdiction attaches and no error committed by the court in the rendition of the judgment can render the judgment void."

C. Where the Court Rests Its Decision upon Two Grounds, Either Ground Is Established Law.

In the former case the court sustained petitioner's demurrer and also its motion to quash and dismissed the case. Had it just sustained the demurrer and dismissed

the case without ruling upon the motion to quash, would the legal proposition here presented be any different? The court below seeks to avoid the application of the rule of *res adjudicata* by quoting without comment one of the grounds advanced by petitioner in the motion to quash, thus suggesting that this ground might have underlain the ruling on the demurrer (R. 127-8). This suggestion is completely untenable. As we have heretofore pointed out, the *sole* ground on demurrer and the *only* issue which could have been decided was the legal question, equally applicable to both prosecutions.

The sustaining of the motion to quash could not mar the authority created by the separate sustaining of the general demurrer. In borrowing one of the grounds from the motion to destroy the efficacy of the sustaining of the demurrer, the lower court's decision is in conflict with:

Railroad Companies v. *Schutte*, 103 U. S. 118, 143, 26 L. Ed. 327;

United States v. *Chamberlin*, 219 U. S. 250, 55 L. Ed. 204, 31 S. Ct. 155,

and with the following decisions of other circuit courts of appeals:

Van Dyke v. *Parker*, C. C. A. 9th Cir., 83 F. (2d) 35, 39;

Irving National Bank v. *Law*, C. C. A. 2nd Cir., 10 F. (2d) 721, 724.

Railroad Companies v. *Schutte*, VIII Otto (103 U. S.) 118, 143, 26 L. Ed. 327 (Oct. 1880), opinion by Mr. Chief Justice Waite. "As to the first question we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in this case of this company, as well as the other, the statutory authority was complete. The point was directly made by pleading and as directly passed on by the Court. Although the bill in the case was finally dismissed because it was not proved

that any of the state bonds had been sold, the decision was in no just sense dictum. It cannot be said that a case is not authority on one point, because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

United States v. *Chamberlin*, Jan. 3, 1911, 219 U. S. 250, 55 L. Ed. 204, 31 S. Ct. 155. Mr. Justice Hughes delivered the opinion of the Court. "This point was presented, considered and decided in the determination of the cause and the decision is none the less authoritative because there was another ground for the ultimate conclusion. *Railroad Co.* v. *Schutte*, 103 U. S. p. 143; *Union Pacific* v. *Mason City Co.*, 199 U. S. p. 166."

Van Dyke v. *Parker* (C. C. A. 9th Cir.), April 6, 1936, 83 F. (2d) 35, 39: "The mere fact that either of two grounds upon which a court bases its decisions might alone be sufficient to sustain the tribunal's conclusions does not make the other ground obiter dictum, if the court elects to rely upon both. The reason for this is obvious. Who is to say which is the controlling reason, and which obiter dictum? Each of the supporting pillars of the opinion is entitled to equal weight."

Irving Nat. Bank v. *Law* (C. C. A. 2nd Cir.), Feb. 1, 1926, 10 F. (2d) 721, 724. "On the contrary if a court decides a case on two grounds, each is a good estoppel. Kesseler *v.* Armstrong Cork Co., 158 F. 744, 85 C. C. A. 342 (C. C. A. 2). Similarly, if the decision of a court on the point of law is based upon several grounds, each is equally authoritative on all, and no one is better. Railroad Co. *v.* Schutte, 103 U. S. 118, 26 L. Ed. 327; U. S. *v.* Chamberlin, 219 U. S. 250, 31 S. Ct. 155, 55

L. Ed. 204; U. S. *v.* Title Ins. Co., 265 U. S. 472, 44 S. Ct. 621, 68 L. Ed. 1110."

D.

The court below, in disregarding all of the evidence as to the issue raised by the demurrer and litigated before the court in the former case, and in arbitrarily surmising that the court in that case must have decided the demurrer upon other grounds which were not and which could not have been advanced under the demurrer, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II.

The decision of the court below, holding that it is a crime under Section 206(a) of the Interstate Commerce Act for a motor carrier to use an alternate highway in the performance of an otherwise duly authorized service, is error and is a decision of an important question of Federal law which has not been, but should be, settled by this Court.

This contention does not question the power expressly granted to the Commission under Sections 204 (c) to issue a cease and desist order nor does it question the proposition that a fine might be levied against a carrier, under Section 222 (a), for the violation of such an order. It is also clear that the Commission, under Section 222 (b), may have its orders enforced by injunction. In fact, the Commission did secure a preliminary injunction against these very Marmarth-Miles City operations and petitioner, for practical reasons, abandoned its appeal in that case and consented to a permanent injunction (41 F. Supp. 651). The court below seems to have been influenced by its view (R. 127) that if it sustained petitioner's plea of *res adjudicata* it would be granting petitioner operating rights against the

will of the Commission. In view of the expressly stated remedies remaining to the Commission, the lower court's fears in this respect were patently unsound.

The point urged upon demurrer in the first criminal case and again in the case at bar was that the acts charged in the information came neither within the letter nor the spirit of the prohibitions of the Motor Carrier Act. We contended that the Act, *as a penal statute*, did not expressly forbid such a practice and was too ambiguous to support a conviction; and that the choice of highways over which to perform a duly authorized service should be limited by state rater than national authority and as a consequence of which it would not have been the intention of Congress to so limit a service as to make a crime of the use of any other highway than that designated by the Commission. Our brief to the court in the first criminal case appears at pages 30 to 58 of the abstract of record.

So far as your petitioner is aware, this question of law has never before been litigated and your petitioner believes it to be an unsettled and important point requiring the attention of our highest Court.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated September 11, 1943.

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